

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of:)	
)	
Implementation of the Local Competition)	
Provisions in the Telecommunications)	CC Docket No. 96-98
Act of 1996)	
)	
Intercarrier Compensation)	CC Docket No. 99-68
for ISP-Bound Traffic)	

**REPLY OF CORE COMMUNICATIONS, INC. TO
OPPOSITION TO STAY PENDING JUDICIAL REVIEW**

INTRODUCTION AND SUMMARY

In its petition for a stay pending judicial review, CoreTel demonstrated that it will suffer irreparable harm in the absence of a stay because it will be forced to abandon markets it would otherwise serve, and it is likely to succeed on the merits of its claim that the growth cap and new markets bar are arbitrary and capricious. Comments filed in support of CoreTel's petition confirm that a stay should be granted, or alternatively that the Commission should defer the effective date of the new markets and growth cap provisions for at least one year, during which time judicial review could likely be completed.¹

¹ See Joinder of North County Communications, Inc. in Petition of Core Communications, Inc. for Stay Pending Judicial Review (filed June 4, 2001); Comments of Sprint Corporation in Support of Core Communications, Inc.'s Petition for Partial Stay (filed June 5, 2001); Response in Support of Core Communication's, Inc. For Stay Pending Judicial Review (filed June 6, 2001) (on behalf of Focal Communications, Inc., Pac-West Telecomm, Inc., and US LEC Corp.); Joint Comments in Support of Core Communications, Inc.'s Petition for Stay Pending Judicial Review (filed June 6, 2001) (on behalf of the Competitive Telecommunications Association, e.spire Communications, Inc., KMC Telecom Holdings, Inc., Intermedia Communications Inc., Net2000 Communications Services, Inc., North County Communications, Inc., SNiP Link LLC, and

Although BellSouth, SBC, Verizon, and the United States Telecom Association (the “incumbent LECs” or “ILECs”) oppose the stay requested by CoreTel,² even they do not dispute that CoreTel will suffer irreparable injury if a stay is not granted. Irreparable injury is the most important factor in determining whether a stay is warranted, so the absence of any dispute that CoreTel will suffer irreparable injury weighs heavily in support of the grant of a stay.

On the merits, the ILECs do not fundamentally defend the growth cap quotas or the new market bar as rational, but instead defend them as merely “transitional.” But the Administrative Procedure Act does not exempt transitional arrangements from its fundamental requirement of rational, reasoned decisionmaking. The ILECs attempt to divert attention from the arbitrary nature of the growth cap and new market bar by arguing that CoreTel is seeking a “preference” or a “windfall.” CoreTel seeks no special treatment or “subsidies” – only the ability to offer the same service to the same customers in the same markets and to recover its costs in the same manner as its established CLEC competitors, subject to the same rules as are applicable to those competitors.

Tellingly, the ILECs never assert that CoreTel, in fact, can recover its costs of terminating traffic that originates on the ILEC networks when competing against a CLEC that can still receive reciprocal compensation payments. The ILECs do not even defend the FCC's “one-size-fits-all” rigid formula for setting firm-specific, market-specific reciprocal compensation quotas through the growth cap.

Wireless World, LLC) (“CompTel *et al.*”); Comments in Support of Core Communications, Inc.’s Petition for Stay Pending Judicial Review (filed June 7, 2001) (on behalf of Level 3 Communications, Inc.).

² See Opposition of BellSouth Telecommunications, Inc., SBC Communications, Inc., The Verizon Telephone Companies, and the United States Telecom Association to the Petition of Core Communications, Inc. for a Stay Pending Judicial Review, CC Docket Nos. 96-98, 99-68 (June 8, 2001) (“Opposition” or “Opp.”).

Instead, the ILECs argue that CoreTel should have foreseen that the Commission would end reciprocal compensation to competitive local exchange carriers (“CLECs”) serving Internet service providers (“ISPs”). But they do not explain how CoreTel could have reasonably anticipated the discriminatory nature of the FCC’s order, including both the new markets bar and the arbitrarily set growth cap.

Here, it is essentially undisputed that the party seeking a stay will be irreparably harmed; that party is being treated less favorably than similarly situated parties; and the Order at issue is, at best, an indirect and surprising response to the judicial decision that led to it. Accordingly, this Commission should avoid the likelihood of a stay being issued by the Court of Appeals by staying the Order itself, or by deferring the effective date of the growth cap and new markets bar for at least a year during which time judicial review will likely be completed.

**I. THE BALANCE OF THE EQUITIES CLEARLY FAVORS
ISSUANCE OF A STAY.**

As CoreTel set forth in its Petition, the four factors that the Commission and the courts examine in ruling on a stay request relate on a “sliding scale,” such that a particularly strong showing on one factor may require relief, even if arguments in other areas are less compelling.³ In addition, the Commission has repeatedly recognized that the most important of the four stay factors is the irreparable harm prong.⁴ Significantly, however, the ILECs’ Opposition does not seriously dispute CoreTel’s showing on this critical factor -- indeed, the ILECs appear to acknowledge that, if a stay does not issue, the challenged rules will force CoreTel out of business

³ See Petition at 17-18 (quoting *Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998)).

⁴ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 4 FCC Rcd. 16511, 16515 (1999) (“The most significant of these [four stay] factors is irreparable harm.”).

in nearly half its markets and result in the loss of several hundred thousand dollars of CoreTel investments in new markets.⁵

The ILECs nonetheless advance the curious claim that such fundamental harm is not “legally cognizable” because “CoreTel can claim no right to uneconomic subsidy payments.”⁶ First, reciprocal compensation is a cost recovery mechanism, not a subsidy.⁷ But even more significantly, CoreTel does not claim any such right. Rather, as its Petition made clear, CoreTel claims the right to a transition plan that does not arbitrarily and irrationally discriminate against CLECs new to a particular market, and in favor of more established CLECs.⁸ More importantly, however, the nature of the rights claimed by CoreTel goes to the *merits* of its challenge to the Commission’s *Order on Remand*. Although CoreTel is – as further set forth below – confident that it will ultimately prevail on the merits, the critical (and undisputed) point for “irreparable harm” purposes is that by the time merits review can be completed, CoreTel will already have been driven out of several new markets, and forced to retrench in established service areas.⁹

The ILECs half-heartedly argue that *a stay of the new-market and growth-cap provisions would irreparably harm them*, because they would have to continue to make reciprocal compensation payments during the pendency of the stay.¹⁰ As a general matter, however, merely having to pay money does not constitute “irreparable harm.”¹¹ The ILECs attempt to circumvent

⁵ Opp. at 6, 11.

⁶ *Id.* at 10.

⁷ See n.16.

⁸ See Petition at 19-24.

⁹ See Petition at 29-30.

¹⁰ See Opp. at 11.

¹¹ See, e.g., *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (“[E]conomic loss does not, in and of itself, constitute irreparable harm.”)

that obvious point by suggesting that when such payments would “disappear into insolvent hands,”¹² irreparable harm may result. There is, however, absolutely no evidence on the record to suggest that CoreTel will become “insolvent” if reciprocal compensation payments continue to be made. In contrast, it is clear that CoreTel will be driven out of several markets and lose substantial investments of time and money if a stay does not issue. Moreover, it is odd that the ILECs would highlight the precarious financial condition of their would-be competitors in the course of opposing a stay that would help to keep CLECs in business.¹³

Finally, the ILECs argue that the public interest weighs against a stay because the Commission has suggested that changes to the reciprocal compensation system are necessary to encourage “viable, long-term competition among efficient providers of local and exchange access services.”¹⁴ As CoreTel set forth in its Petition, however, the discriminatory growth cap and new market bar adopted by the Commission will drive it from a number of markets, and there is a “near certainty that other CLECs” will be similarly affected.¹⁵ The ILECs do not (and cannot) explain how this loss of competitive service providers will result in *more* competition in local markets.

In sum, the ILECs do not seriously dispute that CoreTel will be irreparably harmed if a stay does not issue, and present no compelling arguments that other parties or the public will be

¹² Opp. At 11 (quoting *Palmer v. City of Chicago*, 806 F.2d 1316, 1319 (7th Cir. 1986)).

¹³ The ILECs also argue that CoreTel unreasonably delayed for 35 days before filing its stay petition. That is simply not true. CoreTel did not learn of Verizon’s intention to opt into the Commission’s new rules until CoreTel received a letter, dated May 14, 2001, to that effect. *See* CoreTel Stay Petition, Attachment 2. CoreTel filed its Stay Petition only about two weeks after receiving that letter, and in time for both the Commission and the courts to consider CoreTel’s arguments before the challenged rules are to take effect on June 14, 2001.

¹⁴ Opp. at 11 (quoting *Order on Remand* at ¶ 71).

¹⁵ Indeed, since CoreTel filed its stay petition, numerous CLECs have come forward in support, suggesting that other CLECs will, indeed, suffer similar consequences. *See* n.1, *supra*.

harmful by a stay. CoreTel has thus made a very strong showing on the “most important” of the stay factors, and a stay should accordingly issue.

II. CORETEL IS LIKELY TO PREVAIL ON THE MERITS

The ILECs’ efforts to defend the growth cap and new market bar on the merits fare no better than their “irreparable harm” arguments. Indeed, the ILECs appear reluctant to come to grips with CoreTel’s merits claims at all, preferring to seek shelter in repeated invocations of the “transitional” nature of the *Order on Remand*, and the supposedly great “leeway” that results.¹⁶ To the limited extent that the ILECs do attempt to justify the Commission’s rules, however, the centerpiece of their argument appears to be that the Commission was entitled to do whatever was necessary – both substantively and procedurally – to address a perceived problem of “regulatory

¹⁶ See, e.g., Opp. at 2, 3, 5, 6, 7, 9. The incumbent LECs cite two cases in support of their mantra that an “imperfect” line will be upheld where “transitional mechanisms” are involved. Opp. 6-7. Neither case is analogous. In *PSWF Corp. v. FCC*, 108 F.3d 354 (D.C. Cir. 1997), the Commission changed the rules governing private paging operators. The Commission “grandfathered” applicants for certain paging licenses but subjected them to an eight-month build-out requirement. Alternatively, an applicant could “withdraw its applications and refile them . . . , thereby losing grandfathering’s guarantee of exclusivity but gaining the advantage of constructing its system over a three-year period.” *Id.* at 358. The case does not support the assertion that the D.C. Circuit will approve of the disparate treatment of similarly situated CLECs. Nor is *Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001), on point. That case involved the transition from a comparative application process to the use of auctions to allocate wireless licenses. To implement the transition, the Commission dismissed pending applications that were mutually exclusive. The court rejected arguments that the Commission lacked authority to change allocation procedures midstream, saw nothing arbitrary about distinguishing between mutually exclusive applications and applications that were not, and concluded that the change did not violate existing rules. 237 F.3d at 686-688. The case stands for the proposition that it is not arbitrary and capricious to distinguish between mutually exclusive applications and those that are unopposed; it does not support the proposition that certain CLECs may be effectively barred from competing in a market even though they have made substantial investments in preparation for operating there.

arbitrage.”¹⁷ But the APA requires that agency action be rational and supported by reasoned analysis, which has not been the case here.

Indeed, the ILECs make little attempt to defend the rationality of the new markets bar and growth cap quota provisions challenged by CoreTel, instead obsessively focusing on “regulatory arbitrage” and the purportedly “windfall” nature of reciprocal compensation for ISP-bound traffic.¹⁸ That focus is fundamentally misplaced. The Commission itself has recognized that “carriers incur costs in delivering traffic to ISPs.”¹⁹ The Commission furthermore rejected arguments that termination of ISP-bound traffic is less costly than terminating voice traffic.²⁰ Accordingly, the ILECs repeated references to “windfalls” and “gravy trains” are nothing more than rhetoric designed to obscure the Commission’s direct acknowledgement that there is no cost

¹⁷ The incumbent LECs also suggest (Opp. at 3, 5) that the D.C. Circuit somehow ruled that reciprocal compensation payments to CLECs serving ISPs are illegitimate in *Global NAPs, Inc. v. FCC*, 247 F.3d 252 (2001). The court made no such holding in that case, but simply held that a specific tariff was invalid. The D.C. Circuit’s most relevant decision – which is completely ignored by the incumbent LECs – is, of course, *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), in which the court vacated the Commission’s prior order concluding that Section 251(b)(5) does not apply to ISP-bound traffic. The court in *Bell Atlantic* was well aware that the state commissions were implementing Section 251(b)(5) by providing for reciprocal compensation payments to CLECs serving ISPs that the incumbent LECs considered to be too high. See 206 F.3d at 330 (noting that “the incumbents object to being left at the mercy of the state commissions”).

¹⁸ See, e.g., Opp. at 1, 2, 3, 4, 6, 7, 10. Although the Commission repeatedly mentions “regulatory arbitrage” it does not clearly articulate what it means by that term. At times, that term appears to mean charging rates that are higher than what the Commission believes costs to be. *Order on Remand* ¶ 68. At other times, “regulatory arbitrage” appears to mean cost-spreading because of state or federal mandates on ILECs to charge averaged rates. *Id.* The term “regulatory arbitrage” appears to be little more than an epithet hurled at whatever carrier-to-carrier compensation results the Commission dislikes.

¹⁹ See, e.g., *Order on Remand* ¶¶ 80.

²⁰ *Id.* ¶¶ 91-93. (“Nor does the record demonstrate that CLECs and ILECs incur different costs in delivering traffic that would justify disparate treatment of ISP-bound traffic and local voice traffic under section 251(b)(5).”)

basis for disparate treatment of ISP-bound traffic termination and local voice traffic termination and that ISPs have costs that must be recovered.²¹

The ILECs never attempt to demonstrate that CoreTel can in fact recover these Commission-acknowledged costs when competing against a CLEC that can still receive reciprocal compensation. Nor do the ILECs dispute that CoreTel is a price-taker – *i.e.*, that the prices it can charge ISP end users is limited by the prices charged by the other CLECs to those same ISP end users. The ILECs do not challenge the fact that CoreTel cannot – as the Commission would wish – raise rates to ISPs to recover termination costs when other CLECs in the *same* market, serving the *same* customers, are not also required to restructure rates immediately to eliminate reliance on reciprocal compensation and to shift all cost recovery to the ISP end user.

The ILECs also do not attempt to defend the Commission’s methodology for constructing the growth cap itself. They do not argue that there was any rational nexus between the Commission’s assumption of a 10% nationwide growth in ISP-bound traffic, and the firm-specific, market-specific quotas created by the growth cap. The ILECs do not assert that it is rational for the growth cap quota to be set in a manner such that the quota is given to an individual CLEC, rather than assigned to CLEC customers or otherwise made portable among competing CLECs, as CLECs win customers previously served by other CLECs.

The ILECs further do not assert that the existing growth cap and new markets bar is competitively neutral, but instead assert that the non-neutrality is short-lived. However, because these provisions require some CLECs to use “bill-and-keep” cost recovery even when the Commission has declined to adopt “bill-and-keep” cost recovery generally for ISP-bound traffic,

²¹ *Id.* ¶ 92.

the non-neutrality cannot be said to be temporary or short-lived. Indeed, under the Commission's transition plan, the competitive bias lasts *no less than* three years, with no assurance that it will ever be eliminated.

The ILECs also claim that the rules do not “discriminate” because new entrants into a market are not “similarly situated to companies that have already entered markets and signed contracts with customers based on prior reciprocal-compensation rules.”²² ILECs further argue that because “incumbent CLECs” are “essentially capped at the compensation they are receiving from *existing* customers,” they have “no inherent advantage in obtaining *new* customers.”²³

But this “reasoning” misses the basic point. Only historical monopolist ILECs could assume those existing customers of established CLECs are not subject to competition. In fact, the “existing customers” of established CLECs are a critical target market for growing CLECs like CoreTel. And as ALTS and CompTel explained in an *ex parte* filing before the Commission, “no economically-rational ISP end user would take service from a new CLEC that is forced to require its ISP customers to pay all or a portion of the costs of terminating traffic if existing CLECs in the same market do not require such a payment.”²⁴ Thus, in the real world in which CoreTel must compete, the growth cap and new market rules *do* discriminate against new and recent market entrants – in favor of more established CLECs – and the Commission wholly failed to provide any rational basis for such discrimination.

The ILECs also repeatedly suggest that CoreTel is not “similarly situated” to more established CLECs because CoreTel made investments in new markets after it became aware that

²² Opp. at 5.

²³ *Id.*

²⁴ Petition at 21.

“the issue [of reciprocal compensation] was under review.”²⁵ Again, however, the ILECs miss (or mischaracterize) the nub of CoreTel’s argument. Although CoreTel was certainly aware that the “FCC was considering changes to reciprocal compensation for traffic delivered to ISPs,”²⁶ the critical fact that CoreTel did not and could not have foreseen was “that the Commission would adopt an order that blatantly and dramatically discriminated between CLECs already in a market serving a large, established base of ISPs, and CLECs that were just entering markets or had only a small share of the ISP market.”²⁷ The ILECs cite no portion of the Commission’s *Public Notice*, for example, that could reasonably and specifically have put CoreTel on notice that, in new markets, it would be subject to a “flash cut” to “bill-and-keep” cost recovery, while its established CLEC competitors would be entitled to a phase-down that may never reach bill-and-keep.²⁸ Similarly, nothing in the *Public Notice* reasonably could have put CoreTel on notice that the Commission would devise a rigid quota system – the growth cap – for reciprocal compensation that would not allow compensation payments to be shifted among LECs when customers changed service providers.²⁹ That, however, is precisely what the Commission did, and that is what CoreTel submits was arbitrary and capricious. In any event, under the *Order on*

²⁵ Opp. at 6.

²⁶ Mingo Declaration (Decl.) ¶ 9 (Attachment 1 to CoreTel Stay Petition).

²⁷ Decl. ¶ 9.

²⁸ The ILECs’ assertion that the Public Notice’s reference “new or innovative inter-carrier compensation arrangements for ISP-bound traffic,” Opp. At 8, can constitute notice of the growth cap quotas and new markets bar is, at best, post-hoc rationalization. There is no way that any commenting party could reasonably have anticipated that innovative inter-carrier arrangements would mean discriminatory ones.

²⁹ The ILECs absurdly suggest that a statement in an ALTS/CompTel *ex parte* letter to the effect that a “transition plan” would need to accompany any changes to the reciprocal compensation system could somehow have provided notice that the Commission was considering adopting discriminatory growth cap and new markets bar. See Opp. at 8-9. That suggestion merits no reply.

Remand, established CLECs receive substantial growth cap quotas regardless of whether they made their investments *before* or *after* the FCC declared that reciprocal compensation was under review, so the Commission's statements provide no rational basis for the unequal and discriminatory impact of the new markets bar and the growth cap quotas on newer entrants.

The ILECs also try to rehabilitate the Commission's *Order* by pretending that it "is fully responsive to [CoreTel's] claims that the growth cap discriminates against CLECs seeking to expand in new or recently entered markets."³⁰ Specifically, the ILECs claim that CLEC concerns about discrimination are adequately addressed by the Commission's statement that competing "on the basis of the[] ability to shift costs to other carriers" "undermines the operation of competitive markets."³¹ This statement by the Commission, however, addressed the longer-term benefits that the Commission perceived could result from moving entirely to a bill-and-keep cost recovery mechanism for ISP-bound traffic. It fails entirely to confront the facts that the Commission has never mandated a bill-and-keep system for established CLECs,³² and that the growth cap and new markets bar have direct, immediate, and irreparable anti-competitive effects.

III. DEFERRAL OF THE EFFECTIVE DATE OF THE GROWTH CAP AND NEW MARKETS BAR FOR AT LEAST ONE-YEAR WOULD LIKELY ADEQUATELY PERMIT JUDICIAL REVIEW.

In its comments supporting CoreTel's petition for a stay, CompTel and seven CLECs alternatively suggest that the Commission *sua sponte* delay implementation of the new market and growth cap rules for one year, such that the same rules would take effect April 1, 2002, with

³⁰ Opp. at 9.

³¹ *Id.* (quoting *Order on Remand* ¶ 71).

³² See *Order on Remand* ¶ 74. The Commission deferred the question of whether to adopt bill-and-keep to its *NPRM*, issued simultaneously with the *Order on Remand*. See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking (rel. April 27, 2001), ¶¶ 37-97.

conforming adjustments such as initializing the growth cap based on first quarter 2002 traffic volume annualized.³³ Although adoption of such a delay would not cure the fundamental irrationality of the growth cap quotas and new markets bar, it would permit judicial review to be completed (or nearly so) before those provisions would take effect. Such a delay would also mitigate, but not eliminate, the discriminatory “flash cut” imposed on CLECs that had made substantial investments, but not yet begun to provide service in a market.

CONCLUSION

Contrary to the ILECs’ claims, CoreTel is not seeking “preferential” treatment, but simply the opportunity to compete to offer the same ISP customers the same service in the same markets under the same regulatory limitations as established CLECs. The *Order on Remand* irrationally denies CoreTel that ability, and would drive CoreTel from nearly half its markets before judicial review can be completed. Accordingly, a stay pending judicial review, or alternatively a year deferral in the effective date of the growth cap and new market bar, should be granted.

Respectfully submitted,



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³³ CompTel *et al.* at 5.